United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 75-4208

United States Court of Appeals

FOR THE SECOND CIRCUIT

HENDERSON TRUMBULL SUPPLY CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Cross-Application for Enforcement of a Supplemental Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly overruled the Company's objections to the election conducted among the Company's employees.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Henderson Trumbull Supply Corporation (herein "the Company") to review a Supplemental Order of the National Labor Relations Board. The Board has filed a cross-application for enforcement of its Supplemental Order. The Board's Supplemental Decision and Order issued on September 11, 1975, and is reported at 220 NLRB No. 42 (A. 1-17).[1] The Board's original Decision and Order issued on August 6, 1973, and is reported at 205 NLRB 245 (a. 1-8, 13-16, 43-56); this Court's decision remanding the case to the Board issued on July 23, 1974, and is reported at 501 F.2d 1224. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151 *et seq.*), the unfair labor practices having occurred in Trumbull, Connecticut.

I. THE BOARD'S ORIGINAL FINDINGS OF FACT AND CONCLUSIONS

The Company operates a lumberyard selling building materials and home supplies in Trumbull, Connecticut (a. 49; 22, 27). On May 11, 1972, Local 191, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Union") filed a petition with the Board requesting certification as collective bargaining representative of certain of the Company's employees (a. 23, 27). On

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[1] "A." references are to the printed appendix; "a." references are to the printed appendix filed with the Court in the original proceeding (Docket No. 73-2441). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

May 26, 1972, the Company and the Union executed a Stipulation for Certification Upon Consent Election in a unit of all employees of the Company, excluding office clericals and others normally excluded (a. 45; 23, 27). In the election conducted on June 14, 1972, the Union won by a vote of 7 to 6 in a unit of 15 eligible voters (a. 45; 23-24, 27-28).

The Company filed timely objections, alleging that the Union had made material misrepresentations of fact which prevented an exercise of free choice by employees and left no opportunity for the Company to reply (a. 45; 2). Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8 (29 C.F.R.), the Board's Regional Director for Region 2 undertook an administrative investigation of the Company's objections (a. 45; 2). The investigation showed, *inter alia,* that two days before the election Union Business Agent Anthony Rosetti held a meeting at Union headquarters attended by 8 unit employees (a. 45-46, 15; 3). The investigation further showed that four employees stated that during the meeting Rosetti said something to the effect that the Company had "made" approximately one million dollars during the preceding year (a. 15; 4-6). Rosetti denied making any such assertion (a. 5). The Company's gross revenue for the year ending March 31, 1972 was $970,000; its profits were not known at the time of the investigation, because the Company's auditor was still working on its books (a. 15; 6).

The Regional Director concluded from his investigation that the evidence, while "somewhat contradictory," tended to support the employees' version of the incident; that while Rosetti's use of the term "made" might arguably have implied that the Company had earned profits of one million dollars, the term was ambiguous; that Rosetti did not appear to be speaking from personal knowledge; and that the employees were competent to

evaluate the statement in light of their own knowledge of the Company's operations (a. 6). The Regional Director therefore found that the Union had not made any statements "beyond the normal bounds of permissible electioneering" and recommended that the Company's election objections be overruled (a. 7). Following the Company's timely exception and appeal, the Board adopted the findings, conclusions, and recommendations of the Regional Director and certified the Union as bargaining representative in the appropriate unit (a. 15-16).

About November 2, 1972, the Union requested the Company to bargain collectively over wages, hours, and working conditions; its request was refused by the Company (a. 51; 25, 28). Upon a charge filed by the Union, the Board issued a complaint on December 14, 1972, alleging that the Company had failed to bargain collectively over wages, hours, and working conditions (a. 43; 21-27). On February 20, 1973, the General Counsel moved for summary judgment on the ground that all contested issues had been decided by the Board in the representation proceeding (a. 30-36). The Board found that all relevant issues raised in the unfair labor practice proceeding were or could have been litigated in the representation proceeding and accordingly granted the motion for summary judgment (a. 49). The Board then concluded that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the exclusive bargaining representative of its employees and issued an appropriate order (a. 54-56).

II. THE COURT'S DECISION

The Court reviewed the Board's findings in light of the evidence developed by the Regional Director's investigation and concluded that the

Board erred in failing to direct a hearing on the Company's objections. The Court took issue with the Board's determinations that the employees would have recognized the ambiguity in the term "made"; that the employees would not have viewed Rosetti as speaking from personal knowledge; and that the employees were competent to independently evaluate the one million dollar figure in light of their own knowledge of the Company's operations (501 F.2d at 1229-1230). In the Court's view, the Regional Director should have asked the employees "the obviously crucial question: 'What did you understand to be the meaning of the term 'made'?' ", 501 F.2d at 1229, n. 4, and, since he did not, the Court reasoned that, "absent a hearing, there was no justification for the Regional Director or the Board to assume that the employees must have interpreted the alleged statement by Rosetti as a reference to 'gross' revenue or as an uninformed guess." 501 F.2d at 1230. The Court also criticized the Director for failing to "seek to ascertain the impact of Rosetti's statement by inquiring whether any of the interviewed employees had been influenced by it to vote in favor of the Union." 501 F.2d at 1226.[2]

III. THE BOARD'S FINDINGS OF FACT, CONCLUSIONS, AND ORDER ON REMAND

On November 5, 1974, the Board remanded the case to the Regional Director for Region 2 for a full hearing on the Company's election objections (A. 6). The Regional Director then consolidated the representation

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[2] The Court rejected the Company's additional contention that the election should be set aside because 10 of the 15 employees eligible to vote had subsequently been discharged by the Company (501 F.2d at 1230-1231).

and unfair labor practice proceedings and ordered that a hearing be held in the consolidated proceedings before an Administrative Law Judge (A. 6). A hearing was held on January 15, 1975, at which time the Company and the Union appeared and were afforded full opportunity to present evidence, examine and cross-examine witnesses, present oral argument, and file briefs (A. 6). Following the hearing and consideration of the parties' arguments, the Administrative Law Judge issued his Decision on Remand on March 26, 1975, which was affirmed by the Board on September 11, 1975 (A. 2-3).

The Board found that during the fiscal years ending March 31, 1971, and March 31, 1972, the Company had gross revenue of $843,637 and $973,903 and net profits of $11,669 and $16,873, respectively (A. 12). The Board also found that Union Business Agent Rosetti had told the employees at the June 12 meeting that the Company "made" approximately one million dollars; that the Company had no opportunity to reply to Rosetti's statement; and that the employees could reasonably have believed that Rosetti was speaking from personal knowledge (A. 13; 99-100, 111, 204, 206). The Board further found, however, that the statement had not influenced the votes of any of the three employees who testified for the Company at the hearing; that one of the employees, Steve Atkins, immediately realized that the one million dollar figure could not have referred to profits; that Atkins questioned Rosetti regarding the meaning of the one million dollar figure and that Rosetti explained the one million dollars was before expenses; and that Atkins later explained the difference between gross and net figures to 3 other employees who had attended the meeting (A. 14-15; 107, 119, 136-137, 171, 176-180, 205, 207). The Board therefore concluded that the Company had presented insufficient

evidence to warrant sustaining the Company's obejctions and accordingly found that the Company had unlawfully refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act (A. 15-16).[3]

The Board's order requires the Company to cease and desist from refusing to bargain with the Union and from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act (A. 2-3, a. 55). Affirmatively, the Board's order requires the Company to bargain with the Union and to post an appropriate notice (A. 2-3, a. 55-56).

ARGUMENT

THE BOARD PROPERLY OVERRULED THE COMPANY'S OBJECTIONS TO THE ELECTION CONDUCTED AMONG THE COMPANY'S EMPLOYEES

The Company admits that it refused to bargain with the union certified by the Board as the collective bargaining representative of the Company's employees in a concededly appropriate unit. The Company therefore clearly violated Section 8(a)(5) and (1) of the Act "unless the Company can shoulder the 'heavy burden' of establishing that the Board abused its discretion in certifying the election." *N.L.R.B. v. Newton-New Haven Co.*, 506 F.2d 1035, 1036 (C.A. 2, 1974).

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[3] The Board also overruled the Company's additional election objection alleging that Union Business Agent Rosetti overestimated the value of Company Vice President Fred Salvati's new home (A. 9-11). The Company does not challenge this finding before the Court.

A. The applicable principles

It is well-settled that a Board-conducted election will not be upset because of a pre-election misrepresentation unless the objecting party shows that a substantial, material misrepresentation occurred which was likely to have had a significant impact upon the election. *Linn v. United Plant Guard Workers,* 383 U.S. 53, 60 (1966); *Bausch & Lomb Inc. v. N.L.R.B.,* 451 F.2d 873, 876 (C.A. 2, 1971); *Lipman Motors, Inc. v. N.L.R.B.,* 451 F.2d 823, 825 (C.A. 2, 1971). It is equally well-settled that the burden of proof regarding a misrepresentation allegation rests not upon the Board but rather upon the party challenging the election results who must shoulder the "heavy burden" of showing, by specific evidence, that the misrepresentation occurred and that it was likely to have influenced the election. *S. H. Kress & Co. v. N.L.R.B.,* 430 F.2d 1234, 1236-1237 (C.A. 5, 1970).[4] Furthermore, this burden is not met by proof of a merely ambiguous statement or even by proof of a substantial misrepresentation where there is no basis for inferring impact upon the affected employees; in this regard the party alleging a misrepresentation must prove that there was no opportunity to reply, that the employees believed the declarant to be speaking from knowledge, and that the employees could not have independently evaluated the truthfulness of the misrepresentation. *Bausch & Lomb Inc. v. N.L.R.B., supra,* 451 F.2d at 876; *Harlan No. 4 Coal Co. v. N.L.R.B.,* 490 F.2d 117, 124 (C.A. 6, 1974), cert. denied, 416 U.S. 986; *Hollywood Ceramics Co.,* 140 NLRB

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[4] Accord: *N.L.R.B. v. Mattison Machine Works,* 365 U.S. 123, 124 (1961); *N.L.R.B. v. Muscogee Lumber Co.,* 473 F.2d 1364, 1366 (C.A. 5, 1973); *N.L.R.B. v. Sauk Valley Mfg. Co.,* 486 F.2d 1127, 1130 (C.A. 9, 1973); *Amalgamated Clothing Workers v. N.L.R.B.,* 424 F.2d 818, 827 (C.A.D.C., 1970); *Southwestern Portland Cement Co. v. N.L.R.B.,* 407 F.2d 131, 134 (C.A. 5, 1969), cert. denied, 396 U.S. 820.

221 (1962).[5] As shown *infra*, the Board properly concluded that the Company has here failed to sustain its burden of proving either that a clear misrepresentation occurred or that the alleged misrepresentation was likely to have influenced the election.

Moreover, the Board's determination that the Company failed to meet its burden of proof is subject to only the most limited judicial review. As this Court explained in its decision remanding the instant case for hearing:

> We recognize that the conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse. The Board has been entrusted with broad discretion in determining the nature and extent of pre-election propaganda that will be allowed, and it has prided itself on its toleration of intemperate, abusive and inaccurate statements made by the Union during attempts to organize employees. Considerable deference must furthermore be given to the expertise of the Board in this area . . . . Undue appellate interference could threaten the essential functioning of a system that has, according to well-settled standards, governed the conduct of some 9,000 elections annually (citations omitted).

501 F.2d at 1228. Accord: *N.L.R.B. v. Newton-New Haven Company, supra,* 506 F.2d at 1036. This judicial reluctance to overturn Board elec-

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[5] Accord: *N.L.R.B. v. O.S. Walker Co.,* 469 F.2d 813, 817 (C.A. 1, 1972); *N.L.R.B. v. Cactus Drilling Corp.,* 455 F.2d 871, 874 (C.A. 5, 1972); *N.L.R.B. v. Mar Salle, Inc.,* 425 F.2d 566, 571 (C.A.D.C., 1970); *Aerovox Corp. v. N.L.R.B.,* 409 F.2d 1004, 1007-1008 (C.A. 4, 1969); *Int'l Bhd. of Electrical Workers v. N.L.R.B.,* 417 F.2d 1144, 1147 (C.A.D.C., 1969), cert. denied, 396 U.S. 1004; *Baumritter Corp. v. N.L.R.B.,* 386 F.2d 117, 120 (C.A. 1, 1967).

tion determinations is particularly applicable here where the Court has afforded the Company a second opportunity to introduce evidence in support of its objections and the Company has still failed to prove either that a clear misrepresentation occurred or that the employees were thereby influenced in their selection of a collective bargaining representative.

B. The Company failed to prove that Rosetti's statement constituted a misrepresentation

As stated *supra*, pp. 3-4, the Company's election objections alleged that Union Business Agent Rosetti told 8 Company employees that the Company had "made" about one million dollars during the preceding year when in fact the Company had gross sales of $970,000 and net profits of a substantially smaller amount. Following investigation, the Board's Regional Director found that Rosetti had made the alleged statement and that the Company's statement as to its gross sales figures was correct; the Regional Director also found, however, that the employees could not reasonably have interpreted the ambiguous term "made" as explicitly referring to profits rather than gross sales and that the statement therefore did not constitute a clear misrepresentation. Before this Court the Company contended that the term "made" was unambiguous and that the Business Agent had therefore substantially misrepresented the Company's profits. The Court, however, ordered that a hearing be held to determine, *inter alia*, what meaning the employees attached to the statement (*supra*, p. 5), and thus, we submit, implicitly sustained the Board's position that mere proof of the statement – without proof as to impact on the employees – did not establish a clear misrepresentation.

Upon remand, the burden was therefore upon the Company to prove that the employees had interpreted Rosetti's statement as referring to Company profits. As noted above, this burden clearly could not be met by mere proof that the statement was made or that the employees were perhaps uncertain as to the statement's meaning, and at the hearing the Company failed to produce any evidence whatsoever tending to show that the employees understood Rosetti's use of the term "made" as unambiguously referring to profits. Indeed, what little evidence there is on this issue shows the contrary. Thus, as stated *supra*, p. 6, employee Steve Atkins testified that he immediately perceived the ambiguity in Rosetti's statement; Atkins further testified that he immediately asked whether Rosetti meant the Company had profits of one million dollars, that Rosetti replied in the negative, and that Atkins discussed the matter with three other employees before the election. Since the Company has thus failed to demonstrate that Rosetti's statement was unambiguously interpreted as referring to Company profits, the Board properly found (A. 15) that the Company failed to meet its threshhold burden of proving that a substantial misrepresentation even occurred.[6]

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[6] The employees' testimony relied upon by the Company (Br. 6) that they felt "screwed" or "shafted" clearly does not demonstrate that they interpreted Rosetti's statement as referring to net profits rather than gross sales. Thus, employees who had accepted low wages believing their employer to be a small lumberyard might well have expressed such sentiments when their employer's gross sales were called to their attention. In relying upon such ambiguous testimony the Company merely seeks to conceal its failure to ask the employees the "crucial question" suggested by the Court: "What did you understand to be the meaning of the term 'made'?" (*supra*, p. 5).

C. The Company failed to prove that Rosetti's statement might reasonably have had or did have an influence upon the election

In any event, assuming, *arguendo,* that the Company proved that Rosetti's million dollar figure was interpreted by the employees as referring to the Company's net profits, the burden was still upon the Company to prove that the alleged misrepresentation was likely to have had an impact upon the election. In this regard, the Company's proof was doubly deficient. First, the Board's Regional Director had previously concluded, following investigation, that the Company's employees were able to assess the accuracy of the million dollar figure in light of their own knowledge of the Company's operations and accordingly were not likely to have been influenced by Rosetti's statement. The Court, by remanding the case for hearing, afforded the Company an additional opportunity to demonstrate that the employees were not sufficiently familiar with the Company's operations to recognize that one million dollars could not possibly have been an accurate statement of the Company's net profits. At the hearing, however, the Company did not ask a single employee witness to estimate the Company's gross sales or whether the employee could have done so at the time of the election. To the contrary, employee Gerald Cataldo testified that he knew the Company's *gross* profits were no more than $400,000 and employee Steve Atkins testified that a Company official had estimated Company gross profits at $300,000 during a meeting with employees immediately preceding the Union meeting on June 12 (A. 9; 68-69, 158-159, 173, 207). The Company's only evidence suggesting that the employees lacked knowledge of the Company's sales volume was Vice President Salvati's testimony that the employees did not have access

to the Company's financial record books. Such meager evidence clearly does not demonstrate that the Company's employees were so ignorant of the small lumberyard's scale of operations as to unquestioningly accept a 4,000 percent overestimation of the Company's net profits. The Company has accordingly failed to meet its burden of proving that the employees were unable to independently evaluate the statement and accordingly failed to show that the alleged misrepresentation was likely to have had a significant impact upon the election.

Second, the Company also failed to show that the alleged misrepresentation did in fact cause any of the employees to vote in favor of the Union. Thus as noted, the Court, in remanding the case for hearing, criticized the Board's Regional Director because "he apparently did not seek to ascertain the impact of Rosetti's statement by inquiring whether any of the interviewed employees had been influenced by it to vote in favor of the Union" (*supra,* p. 5). While the Board and courts have generally applied an objective rather than subjective standard in determining the impact of a misrepresentation[7] – i.e., would a reasonable employee have been influenced to change his vote? – the Court in the instant case was clearly inviting the Company to demonstrate by subjective employee testimony that at least one employee changed his vote as a result of Rosetti's statement. The Company, however, failed to introduce any such testimony. To the contrary, all three employees called to testify by the Company stated unequivocally that they had favored the Union before attending the June 12 Union meeting and that Rosetti's statement had not influenced

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[7] See *Harlan No. 4 Coal Co. v. N.L.R.B., supra,* 490 F.2d at 122-123, and cases cited therein.

their vote in the election.[8] Measured by the standard which is the law of the case, then, it is plain that the Company has not carried its burden of showing a substantial impact on the election processes.

Having thus failed to produce subjective evidence of impact, the Company now contends (Br. 6-11) that the Board and Court should have applied a purely objective test in determining whether Rosetti's statement influenced the employees' votes. This was, of course, the test applied by the Board in the initial proceeding wherein the Board, as stated, found no impact. While the Court, in remanding the case for hearing, did indicate that "the influence that [the statement] might reasonably have had upon the employees" was one of several factors for the Board to consider, the Court also specifically criticized the Regional Director for failing to ask the employees if they had been influenced by Rosetti's statement. The Court therefore clearly contemplated the introduction of subjective evidence regarding the impact of the statement upon the employees' votes. Furthermore, as noted *supra,* the principal area of objective inquiry – the employees' capacity to evaluate Rosetti's statement – was virtually ignored by the Company at the hearing and, as noted above, the evidence admitted shows that the employees had adequate knowledge

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[8] The employees' testimony that they had not been influenced by Rosetti's statement is particularly significant in light of the Company's apparent efforts to procure contrary testimony; as employee Gerald Cataldo stated in an affidavit taken just two weeks following the election:

> Some time around the end of that week, around June 22, 1972, [Company Vice President] Salvati approached me and told me that he needed three guys to say that the Union sort of forced us to vote for it. This was not the case. I voted for the Union because I wanted it, even before Rosetti made the statement about the money (A. 103, 205).

on which to evaluate the statement. Accordingly, the Company may not now complain that the Board has relied upon subjective evidence developed at the hearing in assessing the impact of Rosetti's statement and the Company has no record basis for asserting that objective evidence compels a finding that the statement interfered with the election.[9]

In sum, the Board properly overruled the Company's election objections because the Company failed to prove that the employees were misled by Rosetti's statement or that the statement improperly influenced any election ballots. The Board therefore properly certified the Union as the collective bargaining representative of the Company's employees, and the Board correctly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

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[9] The Company cites 13 cases (Br. 11-18) in support of its contention that Rosetti's statement must necessarily have influenced the election notwithstanding the employees' contrary testimony. The Company's reliance is misplaced, however, since the misrepresentations involved in all the cited cases were clearly and unambiguously false. Rosetti's statement in the instant case, by contrast, was subject to differing interpretations and can only be termed a misrepresentation to the extent that employees interpreted the word "made" as referring to profits rather than gross revenue. Furthermore, while Rosetti's alleged misrepresentation was a spontaneous oral statement, the misrepresentations involved in 9 of the 13 cited cases were contained in printed letters or leaflets where more exact expression is expected and imprecision or exaggeration is accordingly less likely to be discounted by the employees.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied and that a judgment should be entered enforcing the Board's order in full.

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Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 11th day of February, 1976.